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THE FUTURE OF BANTU LAW

BY FRANCISCO ELÍAS DE TEJADA, SEVILLE

I. Introduction

This study is an estimate of the future based on present facts. It is not possible to predict the future of Bantu law. Rather, we must consider the alternatives in store for it by bearing in mind two things: the evolution which has occurred over the last thousand years in African history, and the complex mixture of powers struggling in 1977 on the so-called Black Continent. To this end we must establish the existence of a law of the Bantu, its defining characteristics and, lastly, the consequences of the impact upon it of the three great reforming movements: Islam, Christianity and European rationalism with its Marxist sequel. It will be possible to decide what future Bantu law may have only when we have elaborated these points.

2. Definition of Bantu

When I speak of Bantu Africa I am referring to the area south of the Sahara Desert and to the people living below the Bled el-Atech or Regions of Thirst, to quote the Islamic geographic terminology. What lies north of the Sahara is not, strictly speaking, Africa, it is an island limited to the north by the waters of the Mediterranean and to the south by the sands of the great desert. Thence comes the Arab name of Gezirah-al Mogreb, Island of the West. These lands are part of the Mediterranean civilization, colonized by the Phoenicians, the Greeks and the Romans as far back as is revealed by archaeological finds. The Mediterranean world could have been Tunisian rather than Roman had Carthage conquered Rome, but even had this occurred the cultural unity would have remained the same. In Egypt there were Pharaohs of Greek extraction and in Cyrene complete schools of Hellenic philosophy flourished. In Tunis some of the most magnificent mosaics of Roman art still remain, and geographers like Ptolemy, emperors like Septimius Severus, philosophers like Plotinus, writers like Tertullian and saints like Anthony, all had their birthplace on the African shores of the Mediterranean. There was no diversification until the Arabs conquered the Island of the West, putting Islamic faith in opposition to mediaeval Christianity. Even so, this argument does not hold good for someone who

talks a language like Castilian, which is studded with Arabic words, or someone who comes from a land like Andalusia, which has given to Islam such philosophers as Ibn Rosch, poets like Ibn Hazm, jurists like Aljoxani, mystics like Ibn Abbad, soldiers like Al-Mansur and Caliphs like Abd-er-Rahman III. The Africa which is here given the title of Bantu goes from the Nubian desert to the Cape of Good Hope and from Senegal to Zanzibar.

I am not unaware that my classification is fairly arbitrary because people of many races live in that area south of the Sahara. On reading the classic work by Baumann and Westermann,[1] one learns that the truly Bantu races live side by side with the Congo Pygmies, the Kalahari negroes, the Hottentots of the southern zone and the Hamites to the east. Likewise, one must not confuse the Nile languages, with their monosyllabic roots and post-nominal genitive, nor the Kuchitas, related to ancient Egyptian, nor the Nigritic languages rich in tonal variations, nor the fragmented remains of the so-called Khoisan, with the strictly Bantu dialects which are marked by specific nominal class systems and based on extreme duosyllables. Nor am I unaware of the variety of African cultural zones, as demonstrated by M. J. Herskovits.[2]

Nonetheless, I think the Bantu element is so important in Africa south of the Sahara that it is possible to use it as the unifying element in the mixture of cultures existing in this vast territory. This is true to such an extent that Africa is one clear cultural unit. Bantu contains what is most important to the Africans, certainly with regard to religion, as Geoffrey Parrinder claims: 'In religious beliefs there is a great similarity between many parts of the continent that cuts across racial origins, perhaps because of content over centuries', such that 'the resemblances are far more important than the differences'.[3] This observation is reiterated as far as political régimes are concerned by Hubert Deschamps.[4] One would not go so far as to say that the unity of oral traditions gives the African something beyond cultural homogeneity, 'la signification ontologique du groupe', as Jean Ziegler maintains.[5] However, nobody can deny that the entire African culture has a basic similarity. It possesses a mixture of typifying characteristics which separates it into one unit different from the remaining cultural groups of the world. To quote an African, Joseph Ki-Zerbo, they have an 'air de famille' over and above all the variations.[6]

[1] R. Baumann and D. Westermann, *Les Peuples et les civilisations de l'Afrique*, trad. de l'allemand, Paris, 1967.

[2] M. J. Herskovits, *The Human Factor in Changing Africa*, London, 1963, tr. into French as *L'Afrique et les africains entre hier et demain*, Paris, 1965, p. 43.

[3] E. Geoffrey Parrinder, *African Traditional Religion*, London, 1954, p. 11.

[4] Hubert Deschamps, *Les Institutions politiques de l'Afrique noire*, Paris, 1962, p. 10.

[5] Jean Ziegler, *Le Pouvoir africain: éléments d'une sociologie de l'Afrique noire et de sa diaspora aux Ameriques*, Paris, 1971, p. 193.

[6] Joseph Ki-Zerbo, *Histoire de l'Afrique noire d'hier à demain*, Paris, 1972, p. 607.

It therefore does not seem arbitrary, when I refer to Bantu, to consider it in a geographical sense as the region south of the Sahara and the Nubian deserts, and to define it culturally as a clearly marked group of indisputable personality.

3. Bantu Law

The cultural unit is also a legal unit, given the fact that law is without exception, in the case of the African, a combination of rules of behaviour which are contained within the flow of life. Therefore it is the product of a religious feeling about existence which is fundamental among the defining characteristics of the African people.

I will shortly illustrate the features of Bantu law which will serve us as a reference point in this study. For the moment, it is sufficient to recall how the law is seen in a scholarly work on the scale of René David's. He assures us that 'Tout en reconnaissant l'extrême diversité des coutumes dans un continent divisé en une multitude de communautés le plus souvent très restreintes, on est d'accord pour constater qu'il existe de façon générale, communs à tous les droits africains, certains traits qui opposent ces droits aux droits européens'.[7] This thesis was already endorsed by the first Africans, who at the beginning of this century were observing institutions; it is sufficient here to recall the proposals of J. M. Sarbah and C. Hayford.[8] These were repeated by C. Dundas in his study on the opposite side of Africa, in which he came to the conclusion that 'In all the tribes I observed a similarity in their conceptions of law and practice which suggested to me that certain principles might be common to all Bantu of these countries'.[9]

4. Characteristics of Bantu Law

Having determined the uniformity of Bantu law, it necessary to outline its characteristics. These are as follows, in my opinion:

(a) It is a religious law, if we interpret religion in its broadest terms, far beyond the duality of creator and created implanted in the western mind by the great Semitic religions of Judaism, Christianity and Mohammedanism. At the very root of all African beliefs lie two elements: the animist personification of the natural elements and the ancestor cult. Of the first, the Dutch priest

[7] René David, *Les Grands systèmes du droit contemporain*, 3e éd., Paris, 1969, p. 562.

[8] J. M. Sarbah, *Fanti Customary Laws* (1897), 2nd ed., London, 1904; C. Hayford, *Gold Coast Native Institutions*, London, 1903.

[9] C. Dundas, 'Native Laws of some Bantu Tribes of East Africa', *Journal of the Royal Anthropological Institute* 51, 1921, pp. 216–78 at pp. 271–8.

Placied Tempels has shown conclusively that the framework of their universe is composed of the forces of life, of vital energy. The African is religious because he is a vitalist and consequently an animist. The ontological system by which the powers are interrelated in the cosmic structure is the only starting point for the foundation of law. To recognize the social order means knowing the natural order, conceived as a combination of vital forces. Human society is constituted by, and obtains its hierarchy in accordance with, the natural hierarchy of life, 'La société humaine, dans son organisation clanique ou politique, est en effet ordonnée également d'après les principes ou plutôt les réalités des forces vitales, de leur accroissement, de leur interaction et de leur hiérarchie.'[10]

(b) From such a vitalist religious position comes the constant presence in daily life of the dead, beings who were powerful on earth and remain powerful, though mere bodiless spirits, or pure vital forces. Just as they were ritualistically venerated to encourage their benevolence during terrestrial life, they continue to be ritualistically revered in their spiritual states, which persist in other forms present on earth. As G. Davy has shown, the product of this is a confusion of the three spheres, religious, social and familial.[11] The lack of differentiation between the three spheres causes Bantu law to be reduced to an appendage of animist religion.

(c) Authority stems from the magical ingredient which impregnates the will of him who acts as an agent of the ancestors and of him who, in representing them, finds himself in a position to influence the direction of spiritual powers of which the course of nature is composed. He who rules, rules to the degree in which he can influence events in acting as apriest of the ancestor cult. To refer it to a model, that of the Waludu studied by Meyer Fortes, it happens that those who wield authority are the interpreters of vital forces, a system with which they interfere but which they do not completely control. From this derives, in the Waludu, the differentiation between the regulatory norm of natural order or 'mulao', the concession which establishes a right or 'buurt', and the 'yuko' or authority in virtue of which the law is laid down.[12] To translate it into terms more familiar to western thought, we could apply it to Roman law, the 'mulao' corresponding to the 'fas' or universal order, the 'buurt' to the 'jus' or implementation of the will of Jupiter through his representations, and the 'yuko' to the 'auctoritas' or magical energy which augments with sacred overtones the decision which comes from the 'buurt', 'jus' or law.

(d) As I have shown elsewhere,[13] the root of Bantu law lies in its musical

[10] Placide Tempels, *La Philosophie bantoue*, trad. du néerlandais, Paris, 1949, p. 82.

[11] G. Davy, *Eléments de sociologie*, 2e éd., Paris, 1950, p. 121.

[12] Meyer Fortes, 'Some Reflections on Ancestor Worship in Africa', in International African Seminar, 3rd, Salisbury, 1960, *African Systems of Thought*, preface by M. Fortes and G. Dieterlen, London, 1965, pp. 122–42 at p. 138.

[13] F. Elías de Tejada, *La Sociología del Africa Negra*, Madrid, 1956, pp. 105–22; 'Bemerkungen über die Grundlagen des Banturechtes', *Archiv f. Rechts- u. Sozialphilosophie* 46, 1960, pp. 503–35.

conception of the universe. The rhythm or beat gives rise to two possible interpretations of the world, the rational and the emotional. The rational interpretation is what has given birth to western civilization and has enabled the entire cosmic reality to be reduced to mathematical tables. Guided by human reason and putting the complete spectrum of natural occurrences into numerical quantities, western man has set foot on the moon and built the wonders of modern technology. The emotional interpretation of the universe does not give rise to mathematical charts but rather to representations or waves of musical energy, which is yet another type of beat, one which is felt even if not understood. For this, the Bantu has made the drums which evoke the emotion produced by capture of natural order divine. For this reason, the Bantu resist mathematics. For this reason, in July 1824, the great Zulu Shaka was puzzled by the way Harry Fynn was counting his herds of cattle. For this reason the Tonga resort to the term 'Ihulabakonti' or 'uncountable' when they have barely counted over the ten fingers of their hands, for this reason in Kisuali they copy only the Arabic numerals of six, seven and nine. All this is because of the limitations imposed by the lack of mathematical ability in the Bantu.

Western law is thus a rational law and it might be possible to establish cybernetic means for determining the rationalized objectivity of justice. Bantu law is, on the contrary, an emotionally based law, which is felt to the same degree as it is reasoned; it is derived from magic, it has a certain logic, what Max Gluckmann terms 'The logic in witchcraft',[14] or let us say a logic which has nothing in common with the mathematical logic employed in western thought.

(e) As a result of its characteristics Bantu law is extremely dynamic. One of the customary pitfalls of Europeans who approach Bantu legal systems is to consider Bantu law as something static, unchanging, permanent, almost as if it had not varied in the course of centuries. Taking note of the appearance of longstanding ancestral rites, they tend to confuse the channels of the river with the water which runs down the channel, referring exclusively to the permanence of ritualistic formulae, forgetting that through these ritualistic formulae there runs the entire daily complexity of life, a life which is all the richer since everything is living emotion, everything becomes part of the emotion without any concessions to narrowly rationalized constructs. After living with the Bantu people for a short time, one learns of the extraordinary tension produced by social situations among them, to a degree inconceivable to western society. In the same way that under official process in Rome a multiplicity of legal complications was possible, there lies in defence of Bantu rites a very rich selection of interpretations of Bantu law.

[14] Max Gluckmann, *Custom and Conflict in Africa*, Oxford 1955, pp. 81–108.

5. Errors of Interpretation

Having defined the features of Bantu law in broad outline, it is necessary to reject some of the interpretations which have been made of it, up to now. The Nigerian, T. Olawale Elias, has set down three attitudes which he takes to be erroneous views not worthy of scientific consideration.[15]

(a) That of the missionaries, by whom Bantu law is dismissed as a collection of pagan beliefs, destined to be destroyed by the theological truth of Christianity;

(b) That of the colonial functionaries, under whom Bantu law must be subordinated to the decrees of the colonizing powers, leaving any complications to a series of penal codes for crimes and punishment, useful for maintaining external order in the colonies;[16]

(c) That of the anthropologists, who are inclined to deny the existence of any legal logic in the mass of ritual precepts which often express the Bantu legal process.

The anthropologists manifest open incomprehension of Bantu legal institutions, because, with a narrow European mentality, they try to fit them by Procrustean means into their own cultural perspectives, perspectives from which it is impossible to understand the African culture. But the most serious lack of comprehension occurs among westernized Africans who try to interpret Bantu law in accordance with the criteria they have learnt at European universities. I will give two examples: a politician, governor and legislator, Patrice Lumumba, and secondly, an excellent lawyer, a distinguished specialist, and among the greatest scholars of law born in Africa, the aforementioned T. Olawale Elias. In both cases the uprooting from their native culture creates an inability to comprehend Bantu law.

Patrice Lumumba is the prototype of the uprooted, intellectual proletarian, a product of the contact between African cultures and European colonization. This 'leader' of African thought had nothing African about him, he belonged to that middle sphere condemned to resentment, one of those who underestimate their native culture without attaining to the European level. A member of the virtually insignificant Bateles tribe, he was originally baptized a Catholic but converted to Protestantism at the age of fourteen in 1939 in the hope of improving his fortune. Thus he became a member of the 'évolués', looked down upon by the whites, looking down upon the blacks. For that reason, in his political acts, he never thought of restoring the Congolese culture, but substituted for it myths taken from the legacy of the French Revolution of 1789. His speeches are full of Jacobin quotations a century and a half old, as Jean Zieg-

[15] T. Olawale Elias, *The Nature of African Customary Law*, Manchester, 1956, pp. 25–6.

[16] On this see further F. Hives, *Justice in the Jungle*, London [1932] and F. H. Melland and C. Young, *African Dilemma*, London, 1937.

ler has pointed out.[17] Patrice Lumumba did not even try to understand Bantu law nor could he have done so. His was a form of abstract and anti-historical universalism learnt from the French declarations of 1789. Patrice Lumumba was incapable of understanding Bantu law because Patrice Lumumba did not think in African terms. His nationalism was another imported theory, it did not spring from the heart of his people; in Patrice Lumumba the accurate observation of Sir Ivor Jennings was confirmed: 'Nationalism is one of the ideas exported by Europe'.[18] His 'nzambi mpungu' was an abstract idea: revolution learned from his readings of European literature. It had nothing in common with the 'nzambi mpungu' of world leadership which existed for those who were truly Congolese of the old order.[19] With Lumumba there is no return to genuine African thought; rather, one falls into the scheme of general ideas described by Yves Benot: democracy, socialism and single parties, a copy under the guise of cultural rebirth or a similar label.[20]

Elias, holding an English doctorate in philosophy and law, wrote the well-known book mentioned above with the preconceived purpose of showing, not what differences exist between African and English law, but that they fall under the same concept of law. As he states in his preface, 'The general thesis it seeks to establish is the simple one, that African law, when once its essential characteristics are fully appreciated, forms part and parcel of law in general. It is thus no longer to be set in opposition to what is frequently but loosely termed "European Law", and this notwithstanding a number of admitted differences of content and of method'.[21]

In this he falls into no slight error. To begin with, he limits himself to applying to Bantu law the concept of law learnt in England. However, he departs from the well-known voluntarist definition of John Austin to establish his own sociological definition: 'The law of a given community is the body of rules which are recognized as obligatory by its members'.[22] By saying this, he subjects Bantu legislation to the voluntary acceptance of legal norms as such, detached entirely from any connection with a religious basis. He ignores the fact that the outstanding feature of Bantu law lies precisely in the fusion of legal doctrines with religious precepts and even animist rites. This leads him to discount the effectiveness of religious sanctions, substituting for them the 'force of public opinion'.[23] He forgets that the public opinion of Bantu communities depends on the compulsory inclusion of the individual in the nucleus

[17] Jean Ziegler, *Sociologie de la nouvelle Afrique*, Paris, 1964, p. 206.
[18] Sir Ivor Jennings, *Democracy in Africa*, Cambridge, 1963, p. 25.
[19] On this see W. G. L. Randles, *L'Ancien royaume du Congo des origines à la fin du XIX^e siècle*, Paris, 1968, pp. 30–1.
[20] Yves Benot, *Idéologies des independances africaines*, 2e éd., Paris, 1972.
[21] Elias, *op. cit.*, p. v.
[22] *Op. cit.*, p. 55.
[23] *Op. cit.*, p. 75, quoting H. R. Hone.

of the social group, to the extent that it would never occur to anybody to consider the African detached from the group to which he belongs from birth to death.

Such an individualistic proposal, impossible in Bantu law, leads him to absurd conclusions. He writes, though this would be inconceivable to an African, that the closed Bantu social group is the equivalent of a political party in European democracies: 'It is rather like the unity often claimed nowadays by a political party or even a State *vis-à-vis* other parties or States'.[24] If Elias had considered seriously the contributions of German sociology instead of drawing one-sidedly on the Anglo-Saxon tradition, he would have been able to distinguish, as Friedrich Tönnies did, between 'Gemeinschaft' and 'Gesellschaft'. He would have realized that the Bantu groups are 'Gemeinschaften' and that it is not viable to apply to them the sociological criteria of the 'Gesellschaft'.

Inspired by the same preconceived theories, he reduces group responsibility in Bantu law to the moral level and asserts that only individual responsibility is legal. There is no further argument except that the group is what causes the responsibility for the individual's acts to fall back in the end upon himself.[25] Nor does he realize that in Bantu law it is not possible to dissociate morality from law, given that both these are interwoven with religion. In his unrestrained zeal, he concludes that 'Both the civil and the criminal aspects of collective responsibility may be paralleled by analogous concepts of English law'.[26] This contradicts the theses of the most prestigious essayists who have unanimously remarked upon the unity of ethics and legality in Bantu law. Let it suffice, among all those one could bring forward in support of this, to cite the opinions of a scholar of the stature of A. R. Radcliffe-Brown, who writes: 'In speaking of the jural element in social relations we are referring to customary rights and duties. Some of these in some societies are subject to legal sanctions, that is, an infraction can be dealt with by a court of law. But for the most part the sanctions for these customary rules are what may be called moral sanctions sometimes supplemented by religious sanctions'.[27] These two examples are adequate to bring out the errors which occur through Elias's desire to enclose Bantu law within the boundaries of English law. The Anglo-Saxon stress on the individual intrinsically provides a law totally different from Bantu law, for Anglo-Saxon individuality is not compatible with the sociological basis on which Bantu law depends. Bantu law never considers the individual so much as the group. To put it in the words of another African, Pathé Diagne, 'Ce ne sont pas les indivi-

[24] *Op. cit.*, p. 83.
[25] *Op. cit.*, p. 89
[26] *Op. cit.*, p. 91.
[27] In A. R. Radcliffe-Brown and D. Forde, eds., *African Systems of Kinship and Marriage*, London, 1950, p. 11.
[28] Pathé Diagne, *Pouvoir politique traditionnel en Afrique occidentale*, Paris, 1967, p. 19.

dus mais les familles ou lignages qui établissent entre elles des relations de ségrégation par rapport à leurs activités, des ordres de prééminence différemment justifiés, des liens de simple contrat de type lamanal, des rapports de souveraineté, de dominance ou de subordination à conséquences économiques plus ou moins étendues, l'exercice d'une fonction politique, la détention de droits par l'unité politique et sociale qu'est une famille lignagère'.[28] This assumes that the individual only counts as part of the group, and it does not permit him to be considered as an independent entity, as Elias wants to treat him as a result of his enthusiasm for moulding Bantu law into English law.

Bantu law must be viewed according to the perspective of African man. This involves considering it as an aspect of life in social harmony with that supreme order of vital forces of which the entire spectrum of universal order consists. Consequently, the western peoples who can can best understand Bantu law are those who set out from the concepts of natural law in the Aristotelian tradition, instead of starting from Anglo-Saxon positive thought. This is how I have interpreted Malaysian 'adat' law,[29] and Max Gluckmann is of the same opinion. It is only possible to understand the essence of Bantu law if we view the law of life as the projection of some other superior, universal order, which is both the natural Aristotelian law and the animist law.

6. The Dynamic Aspect of Bantu Law and Foreign Influences

A major error of scholars is to consider Bantu law as a static body. In reality it is subject to two dynamic processes: the aforementioned internal one, thanks to which, within the rigidity of ritualistic formulae, there flows a great variety of vital situations; and the external one, as a result of which the law is subjected to the changing forces of all the different cultures with the passage of time. The process of historical change took place in two ways: by the internal evolution of Bantu institutions and through foreign influence.

Internal historical change is supported by the mentality of the African, who is not in the least hostile to novelty as is generally believed.[30] M. Fortes and E. E. Evans-Pritchard classify African political systems into those having a central government and those lacking central authority.[31] These distinctions show forms of greater or lesser historical maturity which nonetheless must be analysed as specific periods in the process of time and not as a picture of the present situation.

[29] F. Elías de Tejada, 'El "adat" de los dayak de Borneo ante la filosofía del derecho', in *Revista de estudios politicos* 183–4, 1972, pp. 25–46.

[30] On this see Denise Paulme *Les Civilisations africaines*, Paris, 1961, p. 126.

[31] M. Fortes and E. E. Evans-Pritchard, *African Political Systems*, 3rd impr., London, 1948, p. 5.

Historical change produced by the impact of foreign interference is of central importance because it fulfils the three-fold mission of accelerating, slowing down or diverting the course of the internal process of change in the Bantu communities. Without going so far as to accept the opinion of J. D. Fage that the African history of the last 2,000 years can be shown only in terms of battles against white invaders,[32] it is true that Bantu law has indeed been modified by the last three invasions it has undergone, the Islamic, the Christian and the European rationalist, and that they were all brought about by people of the white race.

The Islamic invasion is the oldest and the most intense, but even so a white invasion. African historians have noted it; 'Abd al-Rahman ibn 'Abd Allah observes that the conqueror of the Shonrai kingdom, the Djauder, who was after all born in the lands of Almería, had blue eyes.[33] Muslim law may be contrasted with Bantu law in the extent to which it is a revealed law. It is adaptable to a much greater degree in a number of the institutions of private law, for example in its acceptance of castes and slavery.[34] For the rest, the theocracy inherent in Islamic thought coincided throughout large areas with the theocracy of the pagan communities, the only altered aspect being the ultimate tenet of the law: in Islam the revelation of a personal God, and in animism, the product of the magical equilibrium of the powers of life. The end result was a number of legal attempts to unite opposing doctrines, among which one can cite as an example that which took place among the Nupe of Nigeria.[35]

Christianity brought greater changes, because it added to the basically different theological foundation of law the requirement of the suppression of such deeply entrenched institutions as polygamy. It is not possible even to begin to outline the effect which it had. It is sufficient to indicate the need to distinguish between the Christian penetration by Catholic and Protestant missionaries and the penetration by the secularized European thought of the colonizing powers in the nineteenth century: for example, France and England. The English colonization was an economic colonization, not a mission of religious propaganda. The lay politics of the government of the Third French Republic often placed the official of the French state in direct opposition to the missionary priest. The African students who went abroad to study learnt, in English universities law of a positivist strain and in the French universities rationalist law, neither of which had anything to do with missionary teachings.

[32] J. D. Fage, *An Introduction to the History of West Africa*, Cambridge, 1955, p. 12.

[33] ['Abd al-Rahman ibn 'Abd Allah, *al-Sa'di*] *Tarikh es-Soudan*, par Abderrahman ben Abdullah ben 'Imran ben 'Amir es-Sa'di. Texte arabe éd. et trad. par O. Houdas [Réprod. de l'éd. orig., Paris, 1898–1900], Paris, 1964, ch. XXI, p. 215.

[34] See, for example, Vincent Monteil, *L'Islam noir*, Paris, 1971, pp. 275–92.

[35] See S. F. Nadel, *A Black Byzantium: the Kingdom of Nupe in Nigeria*, 3rd impr., London, 1951, pp. 171–2.

The intellectual minority was educated in this fashion. These young students produced by European universities returned to Africa to assess Bantu law by criteria not connected to any religious bases. The constitutional documents of the days of independence after World War II were inspired by English liberal law or by the revolutionary principles of 1789. In fact, they found themselves further removed from Bantu law than the theories of the Muslims or the Christians. Legal reform in Africa was a slavish model of rationalist law, of the democratic order and the liberalism of European models. Far from supposing a return to Bantu law, they claimed general abstract principles.[36] In these general principles they condemned at the same time both Christianity and Bantu law, just as their professors in European universities had taught them to condemn law based on animism as well as law based on Christ's teaching. The foreign impact on Bantu law is not currently produced by the great Semitic religions, Islam and Christianity. It is the pressure of belief from secular Europe, though not anticlerical or atheist. It is, then, from this influence that one must estimate the future of Bantu law.

7. *The Future of Bantu Law*

A distinguished scholar of Bantu law, P. F. Gonidec, after studying the destructive effects of the work of the colonial powers on African institutions, concludes that at the time of independence 'les droits traditionnels semblent condamnés'.[37] Limiting myself to the Ivory Coast, I have come to the same conclusion.[38] These are not the results of attempts to impose laws springing from religio-theological roots such as Muslim or Christian natural law, but they are the result of the world-wide spread of European rationalism.

Today it could be said that the penetration into Africa of European legal structures is greater than at any other time in history. Bantu law is relegated to the sphere of sociology. Bantu legal institutions are now considered from a sociological viewpoint of categorizing rare examples and they await the inevitable time when they will be catalogued as artefacts in a museum.

Popular resistance is strong, but the rationalist surge stands neither for combination with Islam, nor for syncretism with Christianity. In the final analysis, animists, Muslims and Christians agree in the affirmation of a few beings of greater importance than the individual, Life, Allah or Christ, whereas the new subjugating rationalist surge will tolerate no such thing and destroys all in the name of an individualism of the European variety. As far as law is concerned, it

[36] On this see C. Coquery-Vidrovitch and H. Moniot, *L'Afrique noire de 1800 à nos jours* (1974), in Spanish tr., Barcelona, 1976, p. 240

[37] P. F. Gonidec, *Les Droits africains: évolution et sources,* Paris, 1968, p. 46.

[38] F. Elías de Tejada, 'La encrucijada jurídica de la Costa de Marfil', in F. Elías de Tejada *et al., Estudios de derecho bantú,* Sevilla, 1974, pp. 11–75.

is now that the true European imperialism over the African peoples is taking place.

It is true that the people in general are resisting. They are firmly rooted in their traditional legal codes which are linked with the notion of social property, the primacy of the group, the ancestor cult and the magical rites of a law thousands of years old. It is also a fact that history is not made by the majority but by the minorities and the minorities who rule in legal terms in Africa are no longer African except in name. They form part of the intellectual proletariat of those who copy Europe, having been uprooted from their African origins.

It is only a question of time. In his exceptional anglophilia, Elias has condemned Bantu law to association with English law by concluding that 'a closer degree of assimilation with English law is forecast',[39] though he concedes that the two will never entirely coalesce. P. F. Gonidec is more circumspect in underlining the reluctance of Bantu law to disappear, when he states his opinion that the final result will be 'un droit nouveau, synthese de ces deux sortes de droit', that is of traditional Bantu and European rationalist law.[40]

I do not believe such a syncretism is possible, because there are no conceivable approximations between the closed group and the isolated individual, between animism and rationalism, and lastly between the ancestor cult and the rationalist cult. For me, C. C. Roberts' comment holds true and will always hold true: 'In the first place European conceptions of law and justice have to be discarded, they have nothing in common with African cultures, they are alien in growth and sentiment'.[41] In this confrontation, in which neither pacts nor truces are possible, not even transitory ones, the European minority will finish sooner or later by destroying Bantu law, which is the native law of Africa.

What will also contribute to this is the fact that Bantu law is lived but lacks theoreticians. The Europeanized minorities, on the other hand, have a doctrine, admittedly foreign to Africa, but still a coherent doctrine copied from English and French teachers. From this comes its widespread penetration. Although upheld by minorities, they are minorities much more weight than the Bantu majorities because they wield two decisive weapons, a perfectly elaborated system and the reins of political power, by managing which they can implant these European doctrines which will end up by killing off Bantu law.

Nor is the lure of a Marxist solution valid, as the lack of a proletariat makes a class struggle impossible in Africa. This is the essential scientific ingredient for implanting socialism, according to the theories of Karl Marx. The attempt to apply Marxist theories to the African world has been undertaken by J. Suret-Canale, according to whom class truggle is reached at a third level, after

[39] Elias, *op. cit.*, p. 301.
[40] Gonidec, *op. cit.*, p. 44.
[41] Charles C. Roberts, *Tangled Justice*, ed. R. Nicholson and G. Orde Browne, London, 1937, p. 63.

one has passed through the stages of the primitive community and the patriarchal and tribal branch of lineage.[42] This, however, has not come to pass, nor can it now be achieved south of the Sahara and thus it remains a mere scholastic formula. However much they are officially proclaimed, the various Marxist formulae have nothing Marxist about them; they are but a way of freeing oneself (under the banner of the left, fashionable among democratic systems world-wide) from political parties, substituting for them single-party systems and military dictatorships. Neither the labourism of Padmore, nor the socialist humanism of Leopold Senghor, nor the commune-rule-based society of Sekou Touré, nor the spiritual socialism of Nkrumah and Kofi Baako, nor the 'Ujamaa' of Nyerere, are any more than ways of justifying situations of a rather confusing dictatorial nature, in Senegal, Guinea, Ghana or Tanzania. They are poor imitations of socialism, having nothing in common with real Marxism. Furthermore, when a true Marxist writes on Africa with the hollow echo of anti-imperialist speeches, he gets no further than the pretext for another dictatorship. Majhemout Diop, for example, arrives at revolutionary dictatorship by way of a single Pan-African party.[43]

The only salvationfor Bantu law would come from a group of legal specialists dedicated to finding philosophical foundations for itj; by elaborating a theory of natural law based on animism, they could create for Bantu law a doctrine similar in function to that of natural law in Western Christian thought. One must determine the guiding principles of the various institutions which, with such remarkable coherence, sustain Bantu law as it is experienced today. One must, that is, limit oneself exclusively to African though in a strictly African juridic enterprise, and put aside the European education of the ruling minorities. One must take from western thought the work-method but discard its prejudices against the realities of Bantu law.

It is upon the appearance of this team of philosophers that the future of Bantu law depends.

[42] J. Suret-Canale, 'Les Sociétés traditionelles en Afrique et le concept du mode de production asiatique', in *La Pensée* 117, 1964, pp. 19–42.

[43] Majhemout Diop, *Contribution à l'étude des problèmes politiques en Afrique noire*, Paris, 1959, pp. 241–50.

FRANCISCO ELIAS DE TEJADA

The Future of Bantu Law

Summary

Bantu law must be viewed from the perspective of African man. It is a combination of rules of behaviour contained within the flow of life linked with the animist personification of natural elements and the ancestor cult.

Bantu law is best understood by starting with concepts of natural law in the Aristotelian tradition, rather than from positivist thought. False interpretations of Bantu law have been made by Christians, European colonialists and anthropologists but the most serious misconceptions are westernized Africans' interpretations of Bantu law according to criteria they have learnt at European universities.

Bantu law is subject to dynamic processes both internally, as within the rigidity of ritual flows a variety of situations, and externally, as the law is subject to change under the influence of different cultures over time. Historical change takes place through the internal evolution of Bantu institutions and by foreign influence.

The law has been modified by three white invasions. The greatest foreign impact has not been that of Islam and Christianity but of secular European rationalism. Legal reform in Africa slavishly imitates the rationalist law, democratic order and liberalism of European models followed by the European-educated élites, despite the preference of the African majorities for the traditional law. The true European imperialism vis-à-vis the African people is taking place in the present through penetration by European legal structures.

It is not possible to syncretize European and Bantu law – the latter would eventually be destroyed. The Marxist solution is invalid, as the lack of a proletariat makes a class struggle impossible in Africa. The salvation for Bantu law lies in legal specialists finding a doctrine to challenge that of the Europeanized minorities. Such a philosophical foundation should be a theory of natural law based on animism.

FRANCISCO ELIAS DE TEJADA

L'avenir du droit bantou

Résumé

Le droit bantou doit être analysé du point de vue de l'homme africain. Il est un ensemble de règles de conduite liées à la personnification animiste des éléments naturels et au culte des ancêtres.

Le droit bantou est mieux compris à partir des concepts de droit naturel dans la tradition aristotélique qu'à partir de la pensée positiviste. De fausses interprétations de la loi bantoue ont été faites par certains chrétiens, par des colonialistes et anthropologues européens, mais les conceptions erronées les plus sérieuses dans l'interprétation de la loi bantoue ont été apprises dans des universités européennes, par des Africains occidentalisés.

Le droit bantou est sujet à des développements dynamiques: de l'intérieur puisque de la rigidité du rite découle une diversité de situations, et de l'extérieur puisque la loi est soumise à des changements sous l'influence de cultures différentes. Le changement historique des institutions bantoues prend place grâce à leur évolution interne et de part les influences étrangères auxquelles elles sont soumises.

La loi a été modifiée par trois invasions de l'homme blanc: l'impact étranger le plus important n'aura pas été celui de l'Islam et du Christianisme mais celui du rationaliste européen laïque. La réforme juridique en Afrique imite servilement la loi rationaliste, l'ordre démocratique et le libéralisme des exemples européens suivis par des élites éduquées en Europe et tout cela en dépit de la préférence des majorités africaines pour la loi traditionelle. Le véritable impérialisme européen sur le peuple africain prend place aujourd'hui avec la pénétration des structures légales européennes.

Il est impossible de faire le syncrétisme du droit européen et du droit bantou: ce dernier sera éventuellement détruit. La solution marxiste au problème est invalide puisque le manque d'un prolétariat en Afrique rend la lutte des classes impossible. Le sauvetage du droit bantou est entre les mains des spécialistes juridiques: à eux de trouver une doctrine qui remette en question celle des minorités européanisées. Semblable fondation philosophique devrait être une théorie de droit naturel basé sur l'animisme.

FRANCISCO ELIAS DE TEJADA

Die Zukunft des Bantu-Rechts

Zusammenfassung

Man muß das Bantu-Recht von dem Standpunkt eines afrikanischen Menschen ansehen. Es ist ein Zusammenbringen von sittlichen Lebensregeln, der animistischen Verkörperung von Naturkräften und dem Ahnenkultus.

Das Bantu-Recht kann man am besten verstehen, wenn man nicht mit dem Positivismus sonern erher mit aristotelischen Naturrechtskonzepten anfängt. Die Christen, die europäischen Kolonialisten und die Anthropologen haben alle falsche Auslegungen des Bantu-Rechts gemacht, aber die bedenklichsten Auffassungen stammen von abendländisch-beeinflußten Afrikanern her, die sich ihre Maßstäbe bei europäischen Universitäten geholt haben.

Das Bantu-Recht ist dynamischen Prozessen unterworfen, zugleich innerlich, da ein strenges Ritual mannigfaltige Stellungen deckt, und äußerlich, da das Recht sich mit der Zeit und durch verschiedene kulturelle Einflüsse ändern kann. Historische Veränderungen entstehen durch die innerliche Entwicklung der Bantu-Institutionen oder durch den ausländischen Einfluß.

Das Gesetz ist von drei Angriffen der Weißen modifiziert worden, unter welchen der Hauptangriff nicht von Islam oder dem Christentum herstammt, sondern vom weltlichen, europäischen Rationalismus. Die afrikanische Rechtsreform ist eine sklavische Nachbildung europäischer Modelle des rationalistischen Rechts, der demokratischen Ordnung und des Liberalismus, so wie sie bei den europäisch-ausgebildeten Oberschichten üblich sind, trotz der Tatsache, daß die Mehrheit des afrikanischen Volkes das Gebrauchsgesetz vorzieht. Der wahre europäische Imperialismus den afrikanischen Völkern gegenüber geschieht heutzutage durch den Einfluß europäischer Rechtsformen.

Es ist unmöglich, das europäische mit dem Bantu-Recht zu synkretisieren – letzteres würde am Ende vernichtet sein. Die marxistische Auflösung ist ungültig, weil es in Afrika kein Proletariat gibt und deshalb auch keinen Klassenkampf geben kann. Um das Bantu-Recht zu retten, müßten Rechtswissenschaftler eine Theorie herausfinden, welche derjenigen der europäisierten Minderheiten entgegentreten könnte. Eine solche philosophische Grundlage sollte eine animistische Naturrechtstheorie bilden.

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